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PRIVILEGED AND CONFIDENTIAL

MEMORANDUM

To: Jerry Meral
Mark Cowin

From: Marc Ebbin

Re: Options and Approaches Concerning Regulatory Coverage under the
BDCP for the State and Federal Water Contractors

Date: July 14, 2011

BACKGROUND

The BDCP will provide the basis for the issuance of regulatory authorizations under the federal Endangered Species Act (ESA) and the California Natural Community Conservation Planning Act (NCCPA) for the take of listed fish and wildlife species resulting from Delta water operations and other activities covered by the Plan. The entities that will receive take authorizations for activities covered under the BDCP are referred to collectively as the “Authorized Entities.”¹ On the basis of the BDCP, take authorizations will be sought by both federal and non-federal entities under the following authorities:

- The non-federal entities will seek regulatory coverage pursuant to ESA section 10(a)(1)(B) and NCCPA section 2835, and
- The federal agency (Reclamation) will seek regulatory coverage under ESA section 7(a)(2) for federally listed species.

The State and federal water contractors participating in the BDCP have requested that they be included among the Authorized Entities and receive take permits under section 10 of the ESA and section 2835 of the NCCPA. Although the State has yet to make a final decision whether to afford the contractors applicant status, the Natural Resources Agency

¹ The BDCP also includes a separate category for certain other entities that receive take authorizations under the BDCP. These “Other Authorized Entities” will have little to no role in the implementation or governance of the Plan.

(Agency) indicated in the December 10, 2010 document, “Highlights of the BDCP,” that it supports such an approach. Similarly, in the “Interim Federal Action Plan Status Update,” released in December 2010, the federal agencies acknowledged that contractors who make significant investments in the BDCP can be permittees under the Plan.²

To help advance the resolution of this issue, this memorandum identifies key considerations that should be factored into any decision made on this matter, including the implications of extending regulatory coverage to the contractors.³ This memorandum does not, however, include a thorough legal analysis of the issues at hand or review of relevant case law. Instead, it sets out the principles that should help guide discussions on this matter.

DISCUSSION

1. What is the Purpose of a Take Permit under the ESA and the NCCPA?
 - Take permits issued under the ESA and the NCCPA authorize the take of species listed as threatened and endangered (and non-listed species in the event of future listing) resulting from activities covered under a conservation plan. Such permits, however, do not authorize the underlying activities that cause the take.
 - A single conservation plan may provide the basis for take coverage for multiple parties engaged in various activities.
2. Who Qualifies for a Take Permit?
 - The ESA and the NCCPA set out few general qualifications for prospective applicants for take permits. Most significantly, the ESA regulations require that a permit applicant demonstrate a “valid justification for the permit and a showing of responsibility.”
 - Under the ESA, a person wishing to get a permit for incidental take submits an application, a description of the activities for which authorization is sought, a list of the species to be covered by the permit, and a conservation plan that meets certain identified criteria. The NCCPA is less specific about the permitting

² The federal document states, in part: “The Federal agencies recognize that a formal relationship typically is established between private parties that are making investments in an HCP and governmental entities whose regulatory strategies are shaped by the HCP. The HCP permit and accompanying Implementing Agreement can provide the vehicle for defining this relationship and, as a result, the [F]ederal agencies believe that the contractors making significant investments in the HCP can be permittees. The Federal agencies anticipate ... that permit conditions will be limited by applicable legal requirements and that permittees will not acquire any new authority over water project operational decisions or delegated authority from governmental agencies.”

³ Much of the discussion in this paper is focused on the permitting process of the ESA. This analysis, however, is also largely applicable to the NCCPA.

process; however, the statute provides that, at the time of plan approval, DFG may authorize by permit the taking of any species covered by an approved plan.

3. What Rights, Benefits, and Privileges Specifically Attach to Permittees?

- Because take permits only authorize the take of species and not the underlying activities, the issuance of take permits to multiple parties to a conservation plan does not, *ipso facto*, vest these parties with new powers or decision-making authority regarding the covered activities or other matters relating to plan implementation. Rather, the roles and obligations of and between multiple permit holders either arise out of their pre-existing authority to control covered activities or other actions or are established by agreement in the conservation plan and the associated implementing agreement.
- The ESA implementing regulations identify certain specific rights and obligations that apply to recipients of take permits. These rights and obligations relate to permit renewal; permit amendment; permit succession and transfer; permit surrender and post-termination mitigation requirements; reconsideration and appeal of a permit suspension or revocation; permit assurances; permit compliance; and reporting obligations.
- Although some specific rights of permit holders are set out by regulation, they may be modified or forfeited through agreements reflected in the conservation plan, implementing agreement, and/or permit. Under the BDCP and its implementing agreement, rights and obligations are likely to differ among the permit holders, reflecting their varying roles in the implementation of the Plan and authorities over covered activities.
- Consequently, the extension of regulatory coverage pursuant to the BDCP to the State and federal water contractors would not directly translate into greater authority for the contractors over decisions affecting the operation of the water projects nor would such coverage afford the contractors an enhanced role in the governance or implementation of the BDCP. As explained in various provisions of BDCP Chapter 7, Implementation Structure, DWR and Reclamation would retain full control and authority over the operations of the SWP and the CVP and would make all final decisions affecting operational issues. The specific roles of DWR, Reclamation, the water contractors, the fish and wildlife agencies, and other interests in plan implementation will be set out in various sections of the BDCP, including Chapter 7, and in the implementing agreement.
- With respect to the contractors' participation in future litigation relating to the BDCP, it is unlikely that their role in such litigation would be significantly enhanced or expanded by virtue of being permittees. Rather, the courts have tended to grant standing to interveners in cases involving the ESA, and such has been the case with specific requests by the State water contractors to intervene in

ESA litigation involving the SWP. Notwithstanding this permissiveness, it is possible that a court's perception of the role of the water contractors in a specific matter could be influenced by their status as permit holders.

3. Why might the Contractors Need Take Coverage?

- The water contractors engage in the activity of taking delivery of water from the SWP and/or CVP, pursuant to contracts with DWR and/or Reclamation. Those actions could potentially be construed as causing the take of listed species. Accordingly, the extension of regulatory coverage to the water contractors for such activities may be advisable and prudent.
- The water contractors will also likely carry out BDCP habitat restoration actions and other conservation measures on behalf of DWR. For those actions, the contractors would not need separate take authorizations; rather, those actions would be covered through the take authorizations issued to DWR. However, there does not appear to be any explicit prohibitions against the fish and wildlife agencies issuing take authorizations for such purposes.
- Under the ESA, "take" is defined very broadly. In a decision of the U.S. Supreme Court, the language of a Senate report on the ESA was referenced, which stated: "'Take' is defined ... in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."⁴
- The broad nature of "take" includes the notion that the take of listed species may occur through direct or indirect harm to species. That is, direct, purposeful action against a listed species is not required to establish take.
- Parties are held liable for take if their actions are a proximate cause of the death or injury to a protected species. The causal relationship of the act and the injury need not be direct. The foreseeability of the injury is a key element in determining whether an action is the "proximate cause" of the injury.
- As with the common law principles of causation, the concept of "joint and several" liability is likely to apply in the context of ESA liability. Courts have recognized that an action which contributes to injury can be a take even if it is not the only cause of injury.

4. What Regulatory Coverage Options are Available to the Water Contractors?

⁴ Under CESA, "take" is more narrowly defined than under the federal ESA.

- *Issuance of Individual Take Permits.* Each of the contractors, or the SFWCA, could submit applications and receive take permits (this was the approach used in the Lower Colorado River HCP). Notwithstanding their “permittee” or Authorized Entity status, the contractors would participate in BDCP implementation and the decision-making process as set out in the Plan and implementing agreement. Substantively, the issuance of the permits would shield the contractors from any potential liability related to the receipt of delivered water and provide them with the benefits of regulatory assurances. Of far greater interest to the contractors, the issuance of permits would serve as recognition of the importance of their roles in the BDCP.
- *Issuance of Certificates of Inclusion.* To eliminate any potential gaps in regulatory coverage related to water contractor activities and to provide demonstrable and affirmative coverage to the water contractors, “certificates of inclusion” or other appropriate instruments could be issued that serve to formally extend take coverage to the contractors.⁵ The ESA regulations provide sufficient flexibility to enable both the State and federal contractors to receive this coverage. The NCCPA provides a similar level of flexibility. Again, the issuance of these certificates would not alter the specific roles and responsibilities of the water contractors in the governance and implementation. These roles would be described in the BDCP and the implementing agreement.
- *No Issuance of Permits or Extension of Regulatory Coverage.* No specific regulatory authorizations would be granted to the State and federal water contractors. This approach, however, could conceivably create a legal vulnerability for the contractors stemming from their decisions to take delivery of water supply (the federal contractors, however, would likely receive sufficient ESA regulatory coverage under Reclamation’s biological opinion).

⁵ Under NMFS regulations, such certificates may be issued by NMFS pursuant to a “general incidental take permit.” Under FWS regulations, DWR would issue such certificates pursuant to written agreement with the water contractors, consistent with the provisions of the BDCP implementing agreement.

